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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 422

THE FIRST NATIONAL BANK OF ST. CLAIRSVILLE, OHIO,

Appellant,

vs.

HOMER J. FINDLEY, AS TREASURER OF BELMONT COUNTY, OHIO, AND E. E. TAYLOR, AS AUDITOR OF BELMONT COUNTY, OHIO.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO.

STATEMENT OPPOSING JURISDICTION.

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INDEX.

Subject Index.

	Page
Statement opposing jurisdiction	1
Summary of argument in opposition to the appeal	1
Introduction to argument	2
Argument in opposition to taking jurisdiction	4
The Ohio statutes involved were substantially amended during the course of this litigation	4
Appellant has only a nominal interest in this appeal. No real party in interest is before the Court	5
All claims of discrimination having been abandoned by appellant, federal questions presented by the pleadings are not open to consideration by this Court	6
No substantial federal question is tendered by this appeal. The asserted right denied is not real	12
The judgment of which review is sought is not in conflict with any pronouncement of this Court	16
Conclusion	19

Table of Cases Cited.

Ballard v. *Hunter*, 204 U. S. 241	16
Baltimore National Bank v. *State Tax Commission*, 297 U.S. 209	15
Corliss v. *Bowers*, 281 U. S. 376	15
Covington v. *First National Bank*, 198 U. S. 100	15
Davenport National Bank v. *Board of Equalization*, 123 U.S. 83	14
Davis v. *Preston*, 280 U. S. 406	6
Des Moines National Bank v. *Fairweather*, 263 U. S. 103,	12,17,18,20
District of Columbia v. *Sweeney*, 310 U. S. 631	5
Findley, Treas. v. *Odland, Receiver*, 127 Fed (2d) 948	20
First National Bank v. *Chapman*, 173 U. S. 205	17
First National Bank v. *Chehalis County*, 166 U. S. 440	15,17
First National Bank v. *Kentucky*, 76 U. S. 353	14,17

Page

First National Bank of Aberdeen v. *Chehalis County*, 166 U. S. 440 13,18
First National Bank of Gulfport v. *Adams*, 258 U. S. 362, ... 4,12,17
Gager, Treas. v. *Prout*, *48 O. S. 89* 16
Gully v. *First National Bank of Meridian*, 299 U. S. 109. 16
Hoenig, Treas. v. *Huntington National Bank*, 59 F. (2d) 479, 45 F. (2d) 213, 287 U. S. 648 11
Home Savings Bank v. Des Moines, 205 U. S. 503 13
Howk v. *Krotzer*, 140 O. S. 100 11
Inglehart v. *Stansbury*, 151 U. S. 68 6
Jett Bros. Distilling Co. v. *Carrolton*, 252 U. S. 1 16
Lionberger v. *Rouse*, 76 U. S. 468 17
Memphis Natural Gas Co. v. *Beeler*, 315 U. S. 649 16
Merchants, etc., National Bank v. *Pennsylvania*, 167 U.S. 461 17
New Orleans v. *Stempel*, 175 U. S. 309 16
Owensboro National Bank v. *Owensboro*, 173 U. S. 664 .. 4,12
Tappan v. *Merchants National Bank*, 86 U. S. 490 14
Tradesman National Bank v. *Oklahoma Tax Comm.*, 309 U. S. 560 14
Union Savings Bank v. *Pancoast, Treasurer*, 142 Ohio State 6 2

STATUTES CITED.

Act of June 3, 1864:
Section 40 (13 U. S. St. at L. 99) 14
Section 41 (13 U. S. St. at L. 99, 112) 14
Constitution of Ohio, Article XII, Section 2 5
General Code of Ohio:
Section 5410 6,14
Section 5411 7,20
Section 5412 20
Section 5672 13
Section 5673 13
Judicial Code, Section 237a 16
National Bank Conservation Act (12 U. S. C. 202) ... 10
Revised Statutes, Section 5219 (42 Stat. at L. 1499) ... 15
United States Code, Title 12:
Section 62 6
Section 548, as amended by the Act of March 25, 1926 (44 Stat. at L. 223, c. 88) 14

IN THE SUPREME COURT OF THE STATE OF OHIO

Cause No. 29199

THE FIRST NATIONAL BANK OF ST. CLAIRSVILLE, OHIO,

Plaintiff-Appellee,

vs.

HOMER J. FINDLEY, AS TREASURER OF BELMONT COUNTY, OHIO, AND E. E. TAYLOR, AS AUDITOR OF BELMONT COUNTY, OHIO,

Defendants-Appellants.

BRIEF IN OPPOSITION TO THE APPEAL TO THE SUPREME COURT OF THE UNITED STATES OF AMERICA.

Summary of Argument in Opposition to the Appeal.

I. Each of the Ohio statutes involved in this litigation has been substantially amended pursuant to the 1929 amendment to the Constitution of Ohio, which completely revamped the system (effective January 1, 1931) of taxing personal property within the state. Questions arising under laws no longer in effect are not of sufficient public importance to require the consideration of this court.

II. No party having more than a nominal interest prosecutes this appeal. The real party in interest is not before the court. Appellant was denied a license to continue in

the banking business on and after March 6, 1933, pursuant to proclamation of the President and the National Bank Conservation Act (Title 12, USC, sec. 202, U. S. C., passed March 9, 1933) and all of its assets were transferred during the course of this litigation either to a new bank of similar name or to liquidating trustees, neither of whom is a party to the action or to this appeal.

III. All elements of alleged discrimination claimed in the pleadings to conflict with either the constitution or statutes of the United States were abandoned by appellant before the case reached the Supreme Court of Ohio. Consequently, the only federal questions of substance presented by the pleadings do not merit consideration. They are now beyond review by this court.

IV. The federal question, if any is tendered by this appeal, is not substantial. Moreover the asserted denial of any right or privilege accruing under favor of either the constitution or statutes of the United States is more fanciful than real.

V. The determination of the Ohio Supreme Court that the statutes of Ohio imposing the taxes in question are not violative of Section 548, Title 12, United States Code, is not in conflict with any determination of this court.

Introduction to Argument.

An appeal is prosecuted from a judgment of the Supreme Court of Ohio, rendered June 30, 1943, reversing in part and affirming in part a decree of the Court of Appeals for the Seventh District of Ohio, within and for Belmont County, which enjoined the collection of taxes on the bank's shares of stock. The opinion of the court is reported under the title of Union Savings Bank *vs.* Pancoast, Treasurer, in 142 Ohio State, 6.

The parties appeared in the Ohio court as in the above caption. They occupy the reverse of that position with respect to this appeal and are herein designated as they appear in this court.

Having stated the question presented in each of the three cases decided as being:

> Were the taxes in question assessed on the shares of stock of the several banks or upon the property of the banks?

the Supreme Court of Ohio construed the Ohio taxation statutes applicable alike to state and national banks. By the judgment from which this appeal is sought it determined that the assailed taxes are imposed upon the shares of the bank and not upon either the bank or its property, that the collective assessment of all the shares and the entry on the tax duplicate, opposite the name of the bank, of the total amount of taxes due on the shares, collectively instead of distributively in the names of the respective owners of the shares, is not violative of Section 548, Title 12, United States Code; that the entry of the levy of taxes on the tax duplicate in the name of the bank does not constitute the same a lien on the real estate of the bank; and that the apportionment of the aggregate amount of taxes due on the bank shares among the respective owners thereof is not a prerequisite to the enforcement of the liability of the bank to collect the taxes due upon the shares of stock and pay same to the treasurer of the county. Accordingly, it was ordered that the judgment of the Court of Appeals "insofar as said decree orders that the pretended liens against the real estate of the appellee, be cancelled of record * * * and insofar as the court renders judgment for appellant on the second cause of action be * * * affirmed and * * * that in all other respects the judgment of the said Court of Appeals be * * * reversed and final judgment rendered in favor of appellants for the reasons stated

in the opinion rendered in this case". (Appellant's Statement of Jurisdiction, pp. 15-16, pp. 56-64.)

From the foregoing, it clearly appears that the assertions contained in paragraphs designated 5 (2), (3), (5), (6), (7) and (10) of appellant's Petition on Appeal (pages 3-10), Assignment of Errors (pages 1-8) and Statement of Jurisdiction (pages 2-6) to the effect that the taxes in controversy were "assessed against the bank" and that said taxes were assessed "on the net capital, surplus and undivided profits of the bank, excluding real estate" are, and each of them is, unsupported by either the court's judgment or opinion. They are assertions, not of what the court decided but of what appellants vigorously endeavored to have decided. They spring from the abortive attempt to induce the Ohio court to decide otherwise under the influence of (1899) *Owensboro National Bank* v. *Owensboro,* 173 U. S. 664, and (1922) *First National Bank of Gulfport* v. *Adams,* 258 U. S. 362, cases which the court respectfully considered inapposite. Similarly lacking in sanction are appellant's conclusions that the court's judgment requires the bank "to collect from its individual shareholders undetermined sums", requires the bank "to compute the amount of the taxes due from each shareholder and then to collect the same and pay the amount thereof to the county treasurer", and imposes upon the bank "the obligation to pay the total amount of said taxes * * * by way of penalty * * * before the same became delinquent".

Argument in Opposition to Taking Jurisdiction.

I.

The Ohio Statutes Involved Were Substantially Amended During the Course of This Litigation.

After the three actions consolidated into the instant case (R., p. 27) had been instituted, each of the Ohio statutes in-

volved herein was substantially amended, pursuant to the 1929 amendment of Article XII, Section 2, of the constitution of Ohio (effective January 1, 1931). This amendment abrogated the taxation of bank shares and all other personal property at their true value in money and substituted for the uniform rule the taxation of such property according to its classification. The resulting legislation (114 Ohio Laws, 714) abolished the need for and purpose to be served by tax lists or duplicates in the process of collecting taxes on bank shares as well as on other personal property.

The taxes here involved are for the three years next preceding the effective date of these constitutional and statutory amendments. The asserted invalidity of the taxes in controversy having been based upon the manner in which the assessment was entered upon the tax lists and duplicates currently in use and the requirement of such tax rolls having been abolished by the amendatory statutes, the effect of any pronouncement this court may make in this case would be correspondingly limited. As this court determined in (1939), *District of Columbia* v. *Sweeney*, 310 U. S. 631, questions arising under actions which have expired or have been repealed are not of sufficient public importance to require the consideration of the court.

II.

Appellant Has Only a Nominal Interest in This Appeal; No Real Party in Interest Is Before the Court.

The pleadings hereinafter recited disclose that the real party in interest is not a party to the record or to this appeal. Appellant is a corporation possessed of nothing more substantial than its continuance as a legal entity. All of its assets were transferred before the three original actions were consolidated to either a new bank or to three liquidating trustees, in conseqeunce of its inability to qualify for a

license to continue operating as a national bank, pursuant to the Bank Conservation Act (Title 12, Section 202, United States Code, passed March 9, 1933). Appellant has not subsequently had any legal or beneficial interest in the assets so transferred; those deemed acceptable for banking purposes were acquired by the new bank and those deemed unacceptable for such purpose passed to the trustees for liquidation on behalf of appellant's depositors and other creditors.

Neither the trustees nor the new bank being a party to the action or to this appeal, and appellant being only nominally interested, the appeal was improvidently allowed.

(1894) *Inglehart* v. *Stansbury*, 151 U. S. 68;

(1930) *Davis* v. *Preston*, 280 U. S. 406.

III.

All Claims of Discrimination Having Been Abandoned by Appellant, Federal Questions Presented by the Pleadings Are Not Open to Consideration by This Court.

Appellant having recited in its Statement of Jurisdiction only such parts of the pleadings as give color to the asserted federal question, a review of its third amended petition (R., pp. 1-15) is pertinent. Scrutiny of it will reveal that the only federal questions of substance presented by the pleadings were abandoned before the case reached the Supreme Court of Ohio.

The initial allegation of the third amended petition is that appellant prosecutes the suit "in its own behalf and for and on behalf of its stockholders having a common interest with it." Next after reciting its corporate and business status under Federal statutes, the capacity of defendants, its compliance with the requirement of section 5410, General Code of Ohio (cf. 12 U. S. C., sec. 62) by keeping open for inspection a list of the names, residences and shares of its stock-

holders, that it had made on behalf of its shareholders the annual tax returns as required by section 5411, General Code of Ohio, and the amount of its capital stock, surplus and undivided profits, after deducting the value of its real estate as shown by said reports, appellant alleged:

> "The said auditor * * * attempted to impose upon plaintiff, by levying and assessing against plaintiff" * * * the said taxes, "which amounts were * * * placed against plaintiff upon the tax duplicates"; that the auditor "did not * * * list nor assess against the owners of the shares * * * taxes upon their respective shares in any amount * * *, and did not * * * place on said tax duplicates * * * the value of the shares of capital stock of plaintiff in the names of the respective owners of such shares of stock"; that "defendants filed said pretended assessments and pretended levy in the office of the recorder * * * for a lien against * * * real estate standing of record in the name of plaintiff"; and that "by reason of the foregoing the pretended assessment of said taxes against plaintiff by said auditor of said Belmont county, Ohio, and threatened collection thereof from plaintiff by said treasurer of Belmont county, Ohio, are and at all times herein stated were, contrary to law and in violation of plaintiff's legal and constitutional rights in the following respects, to wit:
>
> "(a) There is no statute of Ohio nor of the United States of America authorizing or permitting the auditor to make said assessments of taxes against plaintiff.
>
> "(b) Said taxes were assessed against plaintiff at a greater rate than was assessed upon other monied capital, which during all the times mentioned herein came into actual and direct competition in substantial amounts with the business of plaintiff and of the other national banks of Belmont county, Ohio, contrary to and in violation of Section 5219 of the Revised Statutes of the United States of America, now Section 548 of Title 12 of the United States Code and in violation of Section 1

of the Fourteenth Amendment to the Constitution of the United States of America and also in violation of Section 2 of Article 12 of the Constitution of Ohio in effect prior to January 1, 1931.

"(c) The statutes of Ohio under authority of which said auditor and treasurer pretend to have assessed said taxes against plaintiff and to have the right to collect the same from plaintiff, respectively, are in violation of Section 5219 of the Revised Statutes of the United States of America now Section 548 of Title 12 of the United States Code and also in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States of America and also in violation of Section 2 of Article 12 of the Constitution of Ohio in effect prior to January, 1931, because the same authorize the taxation of the shares of plaintiff and all other national banks of Belmont county at their true value in money without deductions of any kind whatsoever, except as to real estate, while allowing deductions of the debts of the shareholders from the value of shares of building and loan companies and associations directly competing with the business of plaintiff and of said other national banks, and, under certain circumstances, exempt such shares entirely from taxation as hereinbefore set forth, thus discriminating against the monied capital and shares of capital stock of national banks by authorizing the taxing of the same at a greater rate than is assessed upon such other monied capital coming into actual and direct competition in substantial amounts with the business of plaintiff and the other national banks in Belmont county, Ohio."

"Wherefore plaintiff prays that all said pretended taxes levied and assessed against the plaintiff for the years aforesaid be declared, adjudged and decreed to be discriminatory, invalid, illegal and void; that any purported lien upon the property of plaintiff by reason thereof or arising therefrom be decreed to be void and of no effect; that defendants and their respective successors in office be enjoined from collecting or attempt-

ing to collect from plaintiff the said taxes levied and assessed during the years 1928, 1929 and 1930; that pending the determination of this action a temporary restraining order be issued forbidding any action upon the part of defendants in collecting said taxes or assessing any penalties for the failure to pay said taxes and that upon final hearing said restraining order be made permanent and that plaintiff have such other and further relief as is proper."

"Plaintiff further prays that the defendant treasurer of said county be required and ordered to return to plaintiff the amount of taxes so paid by it under protest and mistake of law and facts, to wit, the sum of $6,575.30 paid in the year 1927 for the year 1926 and the sum of $7,294.08 paid in the year 1928 for the year 1927, for which separate amounts plaintiff prays judgment against said defendant treasurer of said county."

The foregoing paragraphs designated (b) and (c) relate to the averment that "the monied capital of building and loan companies and associations in Belmont county came into actual and direct competition with the business of plaintiff and the other national banks in Belmont county, Ohio, and such competition during each of said years was substantial in amount and as hereinafter set forth in part, to wit:" Then follows a detailed comparison of appellant, all national banks and all building and loan associations in Belmont county, with respect to the total of monied capital in each represented by: (a) capital, surplus and undivided profits, (b) deposits, (c) loans upon the security of real estate, and (d) loans upon the security of collateral; but there is absent any suggestion that one of the mentioned financial institutions exists in the taxing district in which appellant bank is located. Evidence in support of either competition or discrimination was not tendered and the claims of appellant with respect thereto were abandoned (R., 35, 189, 192-193), as conceded in its Statement of Jurisdiction, (p. 12).

Paragraph 8 of the third amended petition (R., p. 11) also contains a recital of developments in plaintiff's status after three original actions later consolidated were filed, whereby, not being licensed to resume normal banking operations after the national bank holiday March 5, 1933, a conservator was appointed pursuant to the provisions of the Bank Conservation Act (Title XII, U. S. C., Section 202 et seq., passed March 9, 1933) and had custody of the bank's assets while its reorganization, effective one year later, was in progress. Also recited is the plan of reorganization, pursuant to agreements between stockholders, depositors and other creditors (excepting, however, all parties interested in the taxes involved in litigation), the old banking association and a new one formed, whereby certain assets of the old bank, denominated acceptable, including a stipulated percentage of each deposit, were acquired by the new bank and all other assets of the old bank, denominated "unacceptable," were transferred to designated trustees for the purpose of liquidation in behalf of creditors whose claims were not assumed by the new bank.

The anticipated loss, however, did not occur. On the contrary it was admitted on the trial (R., p. 172) that all creditors except Belmont county were paid in full and that an amount sufficient to pay the taxes in controversy remains in the custody of the liquidating trustees (R., 102, 103). For this reason, this issue also passed out of the case before it reached Ohio reviewing courts.

As indicated in the prayer, recovery of taxes for the years 1926 and 1927 was sought in the second cause of action, wherein the allegations of the first cause were adopted and wherein appellant further alleged that it paid under protest and under mistake of law and fact "taxes pretended to have been levied and assessed—upon its capital, surplus and undivided profits after deducting therefrom the

value of its real estate". On this issue the judgment went against appellant in both lower courts (R., pp. 37, 52) and, as conceded by appellant (Statement of Jurisdiction, p. 12) it was not before the Supreme Court of Ohio in consequence of appellant's omission to prosecute a cross-appeal (*Howk* v. *Krotzer*, 140 O. S. 100).

The second cause of action and the final adjudication against appellant upon it are of significance in another respect. As stated in the Ohio court's opinion (142 O. S., 6, 10) one of the defenses was that "there has been an established practice during these years of so recording the assessments in the name of the bank rather than the individual owners", which appellant had paid "from 1912 to 1928, without protest". Appellant asserted in the second cause of action that taxes for the years 1926 and 1927 were assessed and entered upon the duplicates in the same manner as the taxes in controversy.

The anomaly apparent in the third amended petition of alleging discrimination in the assessment as between banks and other financial institutions, which could exist only if the assailed taxes were imposed upon appellant's shares, and alleging that the taxes were imposed upon the bank's capital, resulted from developments in litigation, the pleadings in which were the pattern for the initial petition (R., pp. 189-193) of banks (12 national, one state) in Belmont County, including appellant. As in *Hoenig, Treas.*, v. *Huntington National Bank*, 59 Fed. (2d), 479 (reversing 45 Fed. (2d) 213, certiorari to which was denied (287 U. S., 648), the alleged invalidity of the taxes, conceded to be on the shares, was due solely to asserted discrimination as compared to money invested in institutions other than banks (R., pp. 189-201), of which only shareholders could complain. The Court of Appeals, Sixth Circuit, having held that competition violative of paramount federal law, between national banks, state banks, building and loan

associations or other financial institutions in Ohio, could not exist, the sole ground of the discrimination originally asserted was cut from under the actions. Accordingly, appellant eliminated from its three amended petitions (DX G, R., p. 225; DX H, R., p. 236; DX I, R., p. 247) the allegation that it "has acted and is acting as the agent of its several stockholders in the payment of the taxes complained against", the allegation that "this suit is prosecuted by this plaintiff on its own behalf and for and on behalf of its stockholders", the allegation that the taxes were "assessed against the shareholders of this plaintiff by virtue of their ownership of such shares but in a lump sum to be paid by it", and the representation that the taxes were "levied and assessed against the shares of this plaintiff". Grossly inconsistent therewith, it asserted in the third amended petition that the property of the bank, and not the shares of the stockholders, were the subject of the assessment.

IV.

No Substantial Federal Question Is Tendered by This Appeal. The Asserted Right Denied Is Not Real.

The record in this case clearly shows that appellant's case centralizes upon the contention that the taxes in controversy are imposed upon the bank's property, contrary to the pronouncements of this Court in (1899) *Owensboro National Bank* v. *Owensboro,* 173 U. S. 664, and (1922) *First National Bank of Gulfport* v. *Adams,* 258 U. S. 363, because, so appellant insists, (1) the bank's capital, surplus and undivided profits were a factor in determining the amount of the taxes, and (2) the assessment was entered on the tax duplicates collectively opposite the name of the bank, instead of distributively in the names of the several shareholders. In (1923) *Des Moines National Bank* v. *Fairweather,* 263 U. S. 103, 105, this Court determined

that "the fact that the capital, surplus and undivided earnings are made the measure of the value of the shares" does not give even "color to the contention", and by the judgment of which review is sought it was determined that omission to apportion the amount of the taxes among the several shareholders and to so enter the same upon the tax rolls did not convert a valid assessment of the shares into an invalid assessment of the bank's property. In so holding the Ohio Supreme Court relied upon *First National Bank of Aberdeen* v. *Chehalis County*, 166 U. S. 440, decided in 1897, prior to the enactment of Sections 5672 and 5673 of the Ohio General Code (102 Ohio Laws, 91) in the form applicable to the instant controversy. As declared in *Home Savings Bank* v. *Des Moines*, 205 U. S. 503, 510, a purpose to tax a bank as distinguished from its shares "against common justice and of doubtful constitutionality ought not to be attributed to the law if any other fair construction is possible".

The purpose of the federal statute as well as its history convincingly disclose the error in assuming that the act of Congress prescribes the method by which the authorized taxes should be assessed, the manner in which they should be entered upon the tax records and the means by which they should be collected. That it did not do, and was not intended to do, either of these things is apparent from the provisions of the act itself and from the cases construing it.

"A consideration of the course of judicial decision on Rev. Stat. Sec. 5219 and its predecessors can leave no doubt that the various restrictions it (Congress) placed on the permitted methods of taxation are designed to prohibit only those systems of state taxation which discriminate in practical operation against national banking associations or their shareholders as a class", and the judicial decisions interpreting them evince "the same purpose to prevent actual discrimination but to allow the

states considerable freedom in working out an equitable tax system." *Tradesman National Bank* v. *Oklahoma Tax Com.*, 309 U. S. 560.

The genesis of Title 12, U. S. C., Section 548, as amended by the act of March 25, 1926 (44 Stat. at L., 223, c. 88), authorizing state taxation of national banks was Section 41 of the act of June 3, 1864 (13 U. S. Stat. at L., 99, 112), which became Section 5219 of the Revised Statutes. The initial provision of the statute is that "the Legislature of each state may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits." Its concluding provision that "Section 5219 of the Revised Statutes of the United States as in force prior to March 25, 1926, shall not prevent the legalizing by the states of any tax heretofore paid, levied, or assessed upon the shares of national banks, or the collection thereof, to the extent that such tax would be valid under said section" strongly indicates an intention to facilitate both assessment and collection of taxes on shares.

Assessment at the source having been made possible by Section 40 of the Act of June 3, 1864 (13 U. S. St. at L., 99), which became R. S. 5210 and Section 62, Title 12, U. S. C., this Court held, in *First National Bank* v. *Kentucky*, 76 U. S. (9 Wall.), 353, 363, that Congress "did not intend to prescribe to the states the method in which the tax should be collected." In *Tappan* v. *Merchants National Bank*, 86 U. S. (19 Wall.), 490, 505, it was declared that "uniformity in the assessment is all that it (the Federal Constitution) demands" and that "when assessed, the tax may be collected in the manner the (state) law shall provide, and this may be varied to suit the necessities of each case." In *Davenport National Bank* v. *Board of Equalization*, 123 U. S., 83, 85, the Court concluded that "the manner of assessing and collecting all taxes by the states is uncontrolled

by the act of Congress," and in *First National Bank* v. *Chehalis County*, 166 U. S., 440, 444, held that a state statute which requires assessment of shares collectively to the bank, is not repugnant to any Federal restriction.

As was declared in *Covington* v. *First National Bank*, 198 U. S., 100, at 112, "Section 5219, Rev. Stat., authorizes the state to tax all the shares of a national banking association, including those owned by nonresidents, as well as those owned in the state, in the city or town where the bank located; * * *. And this statute is express authority to the state by appropriate legislation to make the bank the agent of the shareholders for the purpose of returning the shares and paying the taxes thereon." By the 1923 amendment of R. S. 5219 (42 Stat. at L., 1499), expressly requiring, that the bank "shall make return of such shares and pay the tax thereon as agent of nonresident shareholders," Congress not only removed all lurking doubt whether the state could lawfully impose on a bank the obligation to return the shares for taxation and to pay the taxes thereon with respect to shares held by nonresidents but also sanctioned, if it did not command, to the end of uniformity, and as an implied condition on the conferred power of "taxing all the shares", (Compare: *Baltimore National Bank* v. *State Tax Commission*, 297 U. S., 209), that the state require the bank to serve as the agent of all shareholders with respect to both assessment and payment of the taxes due. Otherwise the purpose of the Constitution of Ohio and of both the Federal Constitution and statute to prohibit discrimination (*Tradesman National Bank* v. *Oklahoma Tax Commission, supra*) would be frustrated. A similar contemplation of collective assessment at the source and a like intent not to permit evasion are manifest in the 1926 amendment (44 U. S. Stat. at L., 223).

Property need not be assessed to any person or in any name. Taxation being more concerned with control than with the refinements of title (*Corliss* v. *Bowers*, 281 U. S.

376) constitutional safeguards are not infringed if taxes are assessed "without any reference whatever to the name of the owner."

Ballard v. *Hunter*, 204 U. S. 241, 256;
New Orleans v. *Stempel*, 175 U. S. 309, 311;
Gager, Treas. v. *Prout*, 48 O. S. 89, 110.

The record in this case thus discloses that, all questions of discrimination having been eliminated prior to its consideration in the Supreme Court of Ohio, the only real question presented relates to the manner of assessment. As decisions of this Court proclaim, this is not a matter of substance and does not involve the validity of a state statute within the meaning of that term as defined in (1919) *Jett Bros. Distilling Company* v. *Carollton*, 252 U. S. 1, 6, and cases there cited. (Compare: *Gully* v. *First National Bank in Meridian*, 299 U. S. 109, 115).

The decisions of this Court "have long since established that an attack upon a tax assessment or levy, on the ground that it infringes a taxpayer's Federal rights, privileges or immunities, will not sustain an appeal under #237 (a) (citations omitted). It is not enough that an appellant could have launched his attack upon the validity of the statute itself as applied; if he has failed to do so we are without jurisdiction over the appeal. The Judicial Code was intended to restrict our obligatory appellate jurisdiction to a narrow class of cases, and to foreclose an appeal as of right whenever the prescribed conditions have not been rigorously fulfilled." (1942) *Memphis Natural Gas Co.* v. *Beeler*, 315 U. S. 649, 650.

V.

The Judgment of Which Review Is Sought Is Not in Conflict with Any Pronouncement of This Court.

Unquestioned pronouncements of this Court are that if the shares of the bank are assessed and taxed as the prop-

erty of the shareholders, such tax is not upon the capital of the bank and does not unreasonably burden a Federal instrumentality, even though and notwithstanding: the bank is authorized but not required to pay the tax, (*First National Bank* v. *Chapman*, 173 U. S. 205, affirming 56 O. S. 310); or is positively required to pay the tax, (*Lionberger* v. *Rouse*, 76 U. S. (9 Wall.), 468); or is required to "collect and pay" the tax, (*Merchants, etc., National Bank* v. *Pennsylvania*, 167 U. S. 461); or is obliged to pay the tax primarily, absolutely or otherwise. (*First National Bank* v. *Kentucky*, 76 U. S. (9 Wall.), 353; *First National Bank of Aberdeen* v. *Chehalis County*, 166 U. S. 440; *Des Moines National Bank* v. *Fairweather*, 263 U. S. 103.)

Conceding that *First National Bank of Aberdeen* v. *Chehalis County*, 166 U. S. 440, is directly contrary to their contentions, appellant misplaces confidence in *First National Bank of Gulfport* v. *Adams*, 258 U. S. 362, as overruling or at least modifying the earlier case. It does neither.

Unlike the case at bar, wherein each assessment is directly responsive to the return of the banks for the current tax year and is clearly identified as being upon shares, the assessment in the Gulfport case was additional to taxes paid on returns for prior years and was based upon an order of court directing the taxing authority (whose first judgment vacating the assessment had been reversed, 108 Miss. 346, 66 So. 407), to "assess the * * * bank with capital stock, surplus, undivided profits, and any and all property assessable to said bank, in the sum of $75,150 * * *, which said property was at said time owned by said First National Bank, and which had escaped taxation for each of the years as hereinbefore set out" (258 U. S. 362, at 364). This order of court obviously followed the reversal in 116 Miss. 450, 77 So. 195, of a judgment for the

bank, which had been determined by the lower court's finding "that the tax is imposed against it upon its capital stock as such, which the state is without power to do." The Supreme Court of Mississippi affirmed such order in the third appeal of the case (— Miss. —— 84 So. 707), notwithstanding the finding of the lower court, and refused to modify its approval on suggestion of error (123 Miss. 279, 85 So. 308).

Confronted with an additional assessment to the bank, "of all other personal property not otherwise mentioned," not based upon any return of the bank but ordered by the lower state court and approved by the state Supreme Court as not in conflict with Section 5219, Revised Statutes of the United States, notwithstanding the provisions of the state statute (abstracted 108 Miss. 346, 66 So. 407), this Court determined only that an assessment not purporting to be made in accordance with the state statute violated requirement of the paramount act of Congress in the form effective before its amendment in 1923 (42 Stat. at L., 1499, Ch. 267). The judgment of the court below was reversed and, so as to permit reassessment or other process in accordance with state statutes, was "remanded for further proceedings not inconsistent with this opinion." That the pronouncement of this case does not conflict in any respect with that announced in *First National Bank of Aberdeen* v. *Chehalis County*, 166 U. S. 440, witness the reliance upon both cases in *Des Moines National Bank* v. *Fairweather*, 263 U. S. 103, at 112.

In deciding the latter case, Mr. Justice Van Devanter was conscious that "several important changes" in Section 5219, U. S. R. S., were made by the amendatory Act of March 4, 1923 (42 Stat. at L., 1499, Chap. 267). One of these changes was the elimination of the provision that

"nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the state within which the association is located." Mistaken interpretation of this proviso as requiring separate entry of proportionate share-taxes on tax records in the name of each shareholder may have induced some states to so prescribe, but more likely they were impelled by advantages accruing to the shareholders from a distributive entry in consequence of allowable deductions to individuals not available otherwise. More important, however, is the fact that in no instance, since *First National Bank of Aberdeen* v. *Chehalis County, supra,* was decided (1897) has this court reversed or modified any judgment announcing that an entry on tax records, opposite the name of a national bank, of ad valorem taxes assessed collectively on the shares of the bank, constitutes an assessment of taxes on shares of the bank's stockholders rather than upon any property of the bank.

Conclusion.

Treating the papers in this case as an application for a writ of certiorari, the appellant does not make any stronger claim to the exercise of this court's jurisdiction. None of the statutes involved are either doubtful or obscure and every contention made by appellant has been considered and denied by decisions of this court. Assuming, therefore, that a Federal question is presented by the record, it is so lacking in substance as not to warrant the court in exercising jurisdiction under section 344 (b), Title 12, United States Code.

As heretofore stated, the Supreme Court of Ohio construed state statutes as not violative of section 548, title

12, United States Code and upheld the validity of the taxes, as did the Circuit Court of Appeals, Sixth Circuit, in (1942) *Findley, Treas.* v. *Odland, Receiver,* 127 Fed. (2d) 948. Regardless whether the questions arising under the state constitution or its statutes so presented were rightly or wrongly determined as conforming to the statutes of Ohio and its constitution, the decision of the state court is controlling here (*Des Moines National Bank* v. *Fairweather,* 263 U. S. 103, 105). As construed by the Ohio Supreme Court, the state statutes contemplate that only the bank's shares be assessed, and do not require that the taxes be entered on tax records distributively in the names of the shareholders. In this connection, the state court pointed to the provision of section 5409, Ohio General Code, which requires that the real estate of the bank be assessed separately "in like manner as the real estate of persons is taxed", and had under consideration the certificate of the county official required by sections 5411 and 5412, Ohio General Code to assess the shares of banks "in the aggregate", that "I have fixed the value of the shares of" appellant, appearing on the report of its resources and liabilities (R., p. 210). Appellant agrees that this "annual report of resources and liabilities" (R. 210), on which were based the taxes in controversy, contained the names of the shareholders and the number of shares owned by each; and by sections 5393 and 5591, General Code of Ohio, this report is required to be filed and is made a public record, open to public inspection, so notice to third persons, to the shareholders and to the bank alike is accomplished. Neither this court nor the Supreme Court of Ohio has observed any provision of the Federal Constitution or statutes prescribing the particular manner of registering assessments on tax rolls for which appellant contends, or any other, as indispensable to the validity of taxes on bank shares, so

no right, privilege or immunity vouchsafed by the jurisdiction of this court has been denied.

Respectfully submitted,

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